IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1101

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOSEPH FRED BIANCONE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

LEE MANDELL,
Attorney for Petitioner.

Suite 800,
Robinson Building,
42 South 15th Street,
Philadelphia, Pennsylvania 19102.

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vs.

JOSEPH FRED BIANCONE,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF PENNSYLVANIA

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Joseph Fred Biancone, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Superior Court of the Commonwealth of Pennsylvania entered in this matter on 13 April 1978.

I. Opinion Below

The opinion of the Trial Court, the Court of Common Pleas of Berks County, Pennsylvania, dated 10 February 1977, was not reported, but is reproduced in its entirety in the Appendix hereto. The judgment of said Court was affirmed without opinion by the Superior Court, *per curiam*, and an appeal to the Supreme Court of Pennsylvania was disallowed. The Orders of the said Courts are reproduced in the Appendix hereto.

II. Jurisdiction

The Order of the Supreme Court of Pennsylvania denying a Petition for Reconsideration of the denial of allowance of appeal was entered on 13 October 1978. The instant Petition is being timely filed. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1257.

III. Question Presented

Did the Trial Court err in receiving inadmissible and highly prejudicial testimony regarding alleged criminal conduct not resulting in conviction on the part of Petitioner, thereby denying him a fair trial in derogation of his Due Process rights under the Fifth and Fourteenth Amendments?

IV. Constitutional and Statutory Provisions

AMENDMENT V - CAPITAL CRIMES: DOUBLE JEOPARDY: SELF-INCRIMINATION: DUE PROCESS: JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, SECTION 1 - CITIZENSHIP: PRIVILEGES AND IMMUNITIES: DUE PROCESS: EQUAL PROTECTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1257(3) - CERTIORARI

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By Writ of Certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

19 P.S. § 711

Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation: unless, -----

One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation: .....

FEDERAL RULES OF EVIDENCE RULE 404(b)

Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

V. Statement of the Case

Petitioner was arrested on 1 February 1975 on charges of receiving stolen property, aiding the consummation of a crime, and conspiracy. The arrest arose out of two burglaries in rural Berks County, Pennsylvania on 23 August 1974, in which three individuals, none of whom was Petitioner, removed a quantity of firearms from two homes.

The matter was tried on 14-18 July 1975 before the Honorable G. Thomas Gates, specially presiding, together

with a jury, during which trial Petitioner testified in his own behalf. Guilty verdicts were returned on all three charges, and on 10 February 1977, various post-trial motions were denied. Petitioner was then sentenced on 22 February 1977 to terms of incarceration totalling five to ten years.

An appeal was filed and argued before the Superior Court of Pennsylvania, whereupon, the judgment and sentence of the Trial Court were affirmed, *per curiam*, on 13 April 1978. A Petition for Allowance of Appeal was filed in the Pennsylvania Supreme Court, which Petition was denied on 30 August 1978, *per curiam*. A Petition for Reconsideration was also denied *per curiam*, on 13 October 1978. Whereupon, the instant Petition follows.

VI. REASONS FOR GRANTING THE WRIT

The Trial Court erred in receiving inadmissible and highly prejudicial testimony regarding alleged criminal conduct not resulting in conviction on the part of Petitioner, thereby denying his due process and a fair trial.

On at least three occasions during the course of trial in the instant matter, the prosecuting attorney was permitted, over defense objections, to question Petitioner about alleged prior burglaries, and about Petitioner's alleged involvement in receiving items therefrom. There is no question that Petitioner was never charged, tried or convicted for any conduct in these prior burglaries. The only allegations of any involvement of Petitioner were those of the participants in the prior burglaries, who clearly sought to reduce their own punishment by implicating Petitioner. Specifically, the following dialogue occurred, commencing on page 72a of the trial record:

Question by Mr. Haddad (Prosecutor): "Now, at that time that you received that call from Mr. Conrad, you were also aware that there were two parties arrested for a series of burglaries, namely, Kevin Hogue and Gary Peltier, were you not?"

Petitioner's Answer: "Yes"

Question by Mr. Haddad (Prosecutor): "And you were also aware that Mr. Hogue and Mr. Peltier mentioned you in their statements to the state police were you not?"

At this point, a proper objection was entered by defense counsel. Also, defense counsel moved for a mistrial at this point. And again on page 74a:

Question by Mr. Haddad (Prosecutor): "Did the state police try and frame you any time before December 26, 1973?"

Petitioner's Answer: "Oh, several times."

Question by Mr. Haddad (Prosecutor): "They did?"

Petitioner's Answer: "Yeah."

Question by Mr. Haddad (Prosecutor): "Can you relate to me those several times that they tried to frame you before December 26, 1973?"

At this point, another objection was entered by defense counsel, and again on page 79a:

Question by Mr. Haddad (Prosecutor): "Mr. Biancone, is not the reason you hid those guns, if the state police came back and found one of the guns was in fact stolen, they wouldn't have the weapon to corroborate the statement and you'd come into court and yell, 'Frame'?"

The persistence of the prosecutor in directing such questions to Petitioner can be interpreted only as a deliberate attempt to suggest to the jury that Petitioner was an individual

habitually involved in the "fencing" of stolen property. Such trial conduct is wholly improper, and was highly prejudicial to Petitioner.

It is well established in Pennsylvania law that a criminal defendant testifying in his own behalf may not be questioned as to offenses other than that charged unless he has first put his character or reputation into issue 19 P.S.§ 711. This same rule of law is embodied for the Federal Courts in Rule 404, F.R.Evidence. The reason for this rule is simple: evidence of alleged prior criminality is wholly irrelevant to the culpability *vel non* of a subsequent offense. See *Commonwealth vs. Allen*, 220 Pa.Super. 403, 289 A.2d 476 (1972).

In the case at bar, Petitioner does not deny that he placed his character in issue during his direct testimony. However, under existing law, this fact only permits his impeachment by evidence of prior *convictions*. See *Commonwealth vs. Butler*, 213 Pa.Super. 388 (1968). The prosecuting attorney, nonetheless, was permitted to question Petitioner on the subject of prior conduct which did not result in conviction. This was clearly improper, and constitutes error which can not be deemed harmless beyond a reasonable doubt, and therefore is reversible error.

VII. Conclusion

WHEREFORE, for the reasons set forth above, it is respectfully submitted that a Writ of Certiorari issue to review the judgment of the Superior Court of Pennsylvania.

Respectfully submitted,

LEE MANDELL,
Attorney for Petitioner.

APPENDIX

Order on the Petition for Allowance of Appeal

SUPREME COURT OF PENNSYLVANIA

Eastern District

September 5, 1978

Lee Mandell, Esq.,
Suite 800 Robinson Bldg.,
42 S. 15th Street
Phila., Pa. 19102

In re: Commonwealth of Pennsylvania v.
Joseph F. Biancone, Petitioner
No. 3528 Allocatur Docket

Dear Mr. Mandell:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Allowance of Appeal in the above captioned matter:

"August 30, 1978

Petition Denied

Per Curiam"

Very truly yours,

Sally Mrvos
Prothonotary

by CATHERINE E. LYDEN
Catherine E. Lyden
Deputy Prothonotary

CEL:mb

CC: Charles A. Haddad, Esq.

Appendix—Order on the Petition for Reconsideration of Denial of Petition for Allowance of Appeal.

Order on the Petition for Reconsideration of Denial of Petition for Allowance of Appeal

SUPREME COURT OF PENNSYLVANIA

Eastern District

October 18, 1978

Lee Mandell, Esq.,
Suite 800 Robinson Bldg.,
42 S. 15th Street
Phila., Pa. 19102

In re: Commonwealth of Pennsylvania v.
Joseph F. Biancone, Petitioner
No. 3528 Allocatur Docket

Dear Mr. Mandell:

This is to advise you that the Supreme Court has entered the following Order on the Petition for Reconsideration of Denial of Petition for Allowance of Appeal in the above captioned matter:

"October 13, 1978

Petition Denied

Per Curiam"

Very truly yours,

SALLY MRVOS
Sally Mrvos
Prothonotary

SM:mb
CC: Charles A. Haddad, Esq.

Opinion, Gates, P.J., 52nd Judicial District, Specially Presiding, February 10, A.D., 1977

IN THE
COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

CRIMINAL

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOSEPH FRED BIANCONE.

Nos. 521 and 521a, 1975.

APPEARANCES:

CHARLES A. HADDAD, ESQUIRE, First Assistant District Attorney, for the Commonwealth.

LEE MANDELL, ESQUIRE, for Defendant.

On the night of August 23, 1974 the rural home of Roy R. Rohrbach, Fleetwood, Berks County, Pennsylvania was burglarized. Seven (7) rifles or shotguns valued at six hundred dollars ($600) were removed by the burglar or burglars.

On the same evening the rural home of John Felix, also of Fleetwood, was burglarized. Seven (7) guns valued at four hundred dollars ($400) were taken from his home.

An investigation disclosed that the burglaries were committed by Michael Folk together with Robert Bialek and Earl Hainly.

Folk was convicted on several other unrelated burglary charges as well as theft and conspiracy in Berks County. Following these convictions Folk admitted to the burglary of both the Rohrbach and the Felix homes. He identified his accomplices Bialek and Hainly. Folk also implicated the defendant Joseph Fred Biancone as the person who directed the commission of the burglaries and the person to whom Folk sold the proceeds of the theft.

Biancone was subsequently charged with aiding the consummation of a crime, receiving stolen property and conspiracy.

Biancone was brought to trial on Monday, July 14, 1975 before a jury. On July 18, the jury found Biancone guilty of all three charges.

Post-trial motions were subsequently filed and the matters have been orally argued before us and we have the benefit of written briefs from the parties.

Trial counsel filed a motion for a new trial and/or arrest of judgment assigning thirteen reasons in support of the motions. However, subsequent to the trial, defense counsel J. Michael Morrissey was elected District Attorney of Berks County and the defendant engaged Lee Mandell, Esquire to represent him in pursuing the post-trial motions.

In the written briefs submitted to us, and at oral argument, only three issues were pursued. We shall consider each of them separately.

The defendant's first argument would not support an arrest of judgment since it is a complaint that there was error committed in allowing testimony concerning the defendant's commission of prior crimes.

Specifically, the defendant complains that the trial judge committed error in allowing incursions into the rule of law prohibiting the introduction into evidence prior crimes not rising to convictions in violation of the Act of March 15, 1911, P.L. Section 1 (19 P.S. 711). That statute provides in pertinent part as follows:

> "Hereafter any person charged with any crime, and called as a witness in his own behalf, shall not be asked, and, if asked, shall not be required to answer, any question tending to show that he has committed, or been charged with, or been convicted of any offense other than the one wherewith he shall then be charged, or tending to show that he has been of bad character or reputation: unless.—
>
> "One. He shall have at such trial, personally or by his advocate, asked questions of the witness for the prosecution with a view to establish his own good reputation or character, or has given evidence tending to prove his own good character or reputation: . . ."

We agree with the proposition as stated but note quickly that it has no application in this case.

There are well established exceptions to the general rule that a testifying defendant may not be questioned concerning prior criminal activity for which he was either convicted or not convicted or even arrested. In other words, the defendant

may voluntarily step beyond the protection of this statute and if he does he may be cross-examined about those matters he injects into the case. *Commonwealth v. Garrison*, 398 Pa. 47 (1959); *Commonwealth v. Yeager*, 329 Pa. 81 (1938); *Commonwealth v. Schambers*, 110 Pa. Super. 61 (1933).

The developmental cases describing this exception employ the phrases "opening the door" or "opening the gate" or "fighting fire with fire." These labels are affixed to a common sense exception to the statutory rule. Thus it's been held that a defendant cannot adopt a trial strategy and at the same time preclude the Commonwealth from testing its validity by cross-examination. *Commonwealth v. Williams*, 227 Pa. Superior Ct. 103 (1974); *Commonwealth v. James*, 433 Pa. 508 (1969); *Commonwealth v. Smith*, 432 Pa. 517 (1968); *Commonwealth v. Stakley*, Pa. Superior, 365 A. 2d 1298 (1976).

Biancone testified on his own behalf. The thrust of his defense was that the Commonwealth's principle witness Folk was lying and that the District Attorney of Berks County and certain State Police Officers used Folk to unjustly "frame" him.

Biancone admitted that he knew Michael Folk and that Michael Folk called him several times concerning bail. Folk testified on behalf of the Commonwealth concerning a statement he had made in December of 1973. Biancone was asked if he recalled Folk's testimony in this regard and his involvement with Frank Conrad. Biancone testified that he saw Folk in December of 1973 concerning the statement and he was asked to explain to the jury what happened. This was his testimony (N.T. 41):

"A. Sometime in December I got a call from Frank Conrad. Mr. Conrad told me Michael Folk was at his store and he's making statements that Trooper Pease and Trooper Seese would let him go free on all the burglaries if he would make statements about me, that they would give him nominal bail and they would see that he wouldn't go to jail, and naturally I was concerned because politically the district attorney and I were then on the outs, and he was out to get me. As a matter of fact, they put me out of the bail bond business. And I told him I would meet them at the store. I went—

"Q. Which store?

"A. Mr. Conrad's store on Penn Street. I went down to the store and Michael Folk was there, disturbed, physically, you could see him, nervous—

"Q. Well, by nervous, would you describe how he appeared to you?

"A. Very excited. His chewing gum—when he gets nervous, he chews gum ten miles an hour when he has gum in his mouth. He was chewing gum real fast. He was playing with his mustache, always does that, and he says, tells me about what Trooper Pease of the Pennsylvania State Police Barracks and Trooper Seese had told him, that he could walk out free and nominal bail if he would blow the whistle on me. I asked him if he would make that statement in front of my attorney, and at that time my attorney was William Bernhart. He said he would. I took him into Mr. Bernhart, me, Frank Conrad and Michael Folk. There was a fourth party but I don't recall who that was. And we went in and I told him to tell Mr. Bernhart what was said. He told Mr. Bernhart. Mr. Bernhart then took him into another room with another

attorney by the name of Stott and his secretary who, I think, is a notary, or someone was a notary, and I was outside of the room, me and Frank Conrad was outside of the room. They took his deposition and he signed it and on it says free, that he wasn't forced into it or anything, nobody held a gun to his head, nobody forced him to do anything. This man did it of his own free will. The only reason I took him in was because Trooper Pease and Trooper Seese and the district attorney was out to try and frame me. This I know."

Biancone continued to testify and was allowed to tell the jury that he is familiar with Folk's reputation in the community and that his reputation is that of a thief and a liar. His testimony then was again directed to the private conference in Attorney Bernhart's office. In response to his counsel's question concerning what occurred at that time, Biancone reiterated as follows (N.T. 43):

"A. Frank Conrad, Mr. Folk and I arrived at Mr. Bernhart's office and he was busy with another client. I waited until he was done. We went into a conference room and we sat down because his office is rather small, and we set there and I sent up to the corner for coffee and sandwiches, and when Mr. Bernhart was done with his other client, he came into the room and I told Mr. Bernhart, I said, 'This gentleman wants to make a statement that the state police, two state policemen are trying to name me on a case and I'd like to get a deposition from him.' Mr. Bernhart then questioned him on what happened. He then told him that if he was going to be arrested on other charges but they would give him time to reconsider their offer, that if he would make statements

against me, that they would give him nominal bail and guarantee that when they come to court that he wouldn't go to jail, and he said, 'I didn't want to tell that lie.' So then Mr. Bernhart then said, 'Just a minute.' He called Attorney Stott and another woman, who she was I don't know, and took him into another room and there's where he made the statement and signed the statement. I never seen it, signed or sealed or anything. As a matter of fact, I haven't seen the statement since.

"Q. Did you ever tell Mr. Folk he's not paying you money fast enough?

"A. He didn't owe me none. Never told him that.

"Q. Did you ever tell him, 'You have to go out and pull some burglaries and make money so you can pay me'?

"A. He was a thief before he got in trouble."

On cross-examination, counsel for the Commonwealth first attacked Biancone's assertions that the District Attorney was out to get him and put him out of the bail bond business. The cross-examiner sought to establish that the reason for withdrawing Biancone's bail bond license was the amount of outstanding bail being greatly in excess of his assets. This is illustrated in the following line of cross-examination (N.T. 60):

> "Q. Now, Mr. Biancone, in 1972, when you terminated your occupation as a bail bondsman, was it not because you had outstanding approximately $193,000 in bail?
>
> "A. It was the reason Mr. VanHoove had put another bail bondsman by the name of Vincent Smith, which is a relative to a lot of friends of his, into the bail bonds business, and they tried to stop me from writing bail and

> then continued to let Vincent Smith write in excess over his property, but I couldn't write bail no more.
>
> "Q. Let's get back and answer my question now. In 1972, when this came to issue, did you have outstanding approximately $193,000 in bail?
>
> "A. I don't know; I couldn't tell you.
>
> "Q. Do you know approximately how much you had outstanding.
>
> "A. No way of telling."

The cross-examination of Biancone on the question of bail continued with evident reluctance on the part of Mr. Biancone to be responsive to the questions properly put on cross-examination. The cross-examiner sought to establish through Mr. Biancone that the local district attorney, VanHoove, had nothing to do with the licensing of bail bondsmen but that it was a matter for the State of Pennsylvania's appropriate insurance department. To further support his contention that he had been framed by the District Attorney, Biancone responded on cross-examination to the following questions (N.T. 61):

> "Q. Did you ever go to the state and say you wanted to renew that license?
>
> "A. No.
>
> "Q. Did you ever go to the state and say that Mr. VanHoove was prohibiting you from writing bail in this county?
>
> "A. No, but I told everybody else about it.
>
> "Q. Who did you tell?
>
> "A. Clerk of Quarter Sessions, Mr. VanHoove himself, every police officer, several others.
>
> "Q. You told police officers. Can you tell me what function the police officers have in writing bail?

"A. Because these are VanHoove's 'gotcha squad', these two fellows.

"Q. Which two fellows?

"A. Mr. Seese and Mr. Pease.

"Q. They were the 'gotcha . . .

"A. The 'gotcha squad'.

"Q. What's that?

"A. Well, when Mr. VanHoove wants anybody of importance arrested, look in the paper, them are the only two that go. They have several other state policemen, but these two guys are the ones they use. Read your papers."

As we have now demonstrated, Biancone attempted to establish that he was innocent, that he was being framed by the District Attorney and the Pennsylvania State Police and that Mr. Folk was not telling the truth in his direct testimony. He sought to do this by describing the telephone call from Mr. Conrad and their joint trip to Attorney Bernhart's office for the purpose of making Folk testify under oath. In again describing the circumstances surrounding Biancone's trip to Bernhart's office the record discloses that Biancone testified (N.T. 67):

"A. I got a call from Mr. Conrad. At that time he had a store on Penn Street. Mr. Conrad told me that Michael Folk is there and he was telling him that the state police want to frame me, they want me, they were willing to let him go free if he would frame me. I became very concerned about it and I told him, 'Put Mr. Folk on the phone.' Mr. Folk got on the phone and told me the same story, what they had said, and I said, 'Would you say that in front of my lawyer?' And he said, 'I'll say it in front of anybody. I don't know anything about you.' So I went

and picked him and Mr. Frank Conrad up and brought them into Bill Bernhart's office, and I didn't pick him up with a gun, either.

"Q. Pardon?

"A. I didn't pick him up with a gun, either.

"Q. This Mr. Conrad, Mr. Conrad has been involved in receiving stolen property?

"A. Just been convicted.

"Q. I beg your pardon?

"A. Just been convicted.

(An objection was overruled at this point.)

"Q. Just convicted this week, wasn't he?

"A. Yes.

"Q. And also convicted about last month?

"A. Yes.

"Q. And also convicted two months ago?

"A. Yes.

"Q. And he was convicted in cases which also involved Mr. Folk, was he not?

"A. Not all the cases involved Mr. Folk.

"Q. Some of them did involve Mr. Folk and some didn't?

"A. Right.

"Q. Now, at that time that you received that call from Mr. Conrad, you were also aware that there were two parties arrested for a series of burglaries, namely Kevin Hogue and Gary Peltier, were you not?

"A. Yes.

"Q. And you were also aware that Mr. Hogue and Mr. Peltier mentioned you in their statements to the state police were you not?"

At this point the defendant objected and the objection was discussed in chambers and overruled. We agree that the court properly allowed this line of inquiry since it was opened by the defendant and was directly relevant to his contention that Folk was lying. The circumstances under which the statements were made, the credibility of Folk and the police officers were certainly put in issue by Biancone and, consequently, the proper subject of cross-examination. In reality, he was putting his character and credibility on the line.

We have already lengthened this opinion beyond what we feel is required to demonstrate that Biancone opened the gate to this line of inquiry by his testimony and, therefore, the cross-examination was proper.

The second thrust of the defendant's argument in support of his motions is that the evidence was insufficient as a matter of law to convict Biancone beyond a reasonable doubt. There is no merit in this contention.

Folk testified in the status of an accomplice. The jury was adequately instructed with regard to the manner of treating accomplices' testimony. No complaint was made as to the adequacy of the trial judge's instructions in this regard. In returning a guilty verdict it is evident that the jury resolved the issues of credibility in favor of Folk and against Biancone.

Folk testified that he became involved with Biancone in Biancone's capacity as a bail bondsman for Folk in the commission of prior criminal offenses. Folk testified that Biancone suggested and directed that the burglaries and thefts take place and that Folk delivered the guns and rifles stolen to Biancone. Folk's testimony was corroborated in part by the

two other participants in the burglaries. Their testimony tended to corroborate peripheral matters testified to by Folk. For example they testified, that after the theft occurred, Folk had a telephone conversation with a party by the name of "Joe". They also stated that after the telephone call they went with Folk to an area near where the defendant lived. They were dropped off while Folk left with the loot and returned shortly afterwards without it. Upon returning, Folk gave Hainly and Bialek money as their share of the stolen property. Although these two accomplices did not have direct contact with Biancone, they indirectly corroborated the testimony of Folk thus bolstering his credibility.

In the final analysis, where as here, there is seriously conflicting testimony, the issue is resolved by a jury under proper instructions. There being no complaint about the instructions, we cannot emasculate the jury's verdict by disagreeing with resolution of the conflicting testimony.

Finally, the defendant contends that trial counsel was ineffective. However, there is no specific allegation apart from the broad based one set forth in the defendant's brief or argued orally before us.

Initially, Biancone was represented by Attorney Fred Noch. At the call of the list one week prior to the trial, Biancone requested Noch withdraw his appearance as counsel. Biancone stated that he would act as his own attorney at trial.

The trial record discloses that the trial judge fully and adequately advised Biancone of the folly of his choice, the implications and the problems he would face and the fact that he was entitled to be represented by an attorney. Biancone was adamant and persistent in asserting his right of self-representation.

Biancone participated in the selection of the jury, gave an opening statement and cross-examined the first two fact witnesses presented by the Commonwealth. Biancone showed a remarkable aptitude for the task as a layman.

After the first two witnesses were examined and cross-examined, Biancone advised the Court that he wished to be represented by Attorney Michael Morrissey. On the morning of July 15, the second day of trial, Attorney Morrissey entered his appearance and asked for a continuance until July 16 for the purpose of preparing for trial. His request was granted.

On July 16, Attorney Morrissey requested an additional continuance until July 17 for the purpose of more fully preparing for trial. Again, his request was granted.

Attorney Morrissey was fully appraised of what had transpired on the first day of trial and there is no contention that he was not informed about what occurred prior to his active participation in the trial which then resumed on July 17, 1975.

We have reviewed the record and we can find no basis to criticize the manner in which Attorney Morrissey conducted Biancone's defense.

Biancone is represented in these post-trial proceedings by other counsel. Consequently, this is the time to raise any issues of trial counsel's competency. Biancone suggests no factual reasons. We can find none. We cannot accept the brief statement by counsel for the defendant in his brief that by now challenging the alleged ineffectiveness of Mr. Morrissey, now the District Attorney of Berks County, would severely prejudice Biancone's case at sentencing. The trial judge was a

visiting judge from Lebanon County and there is nothing in the record which would indicate that the trial judge would be in any manner influenced by any assertions that Mr. Morrissey was incompetent in the trial of Biancone which occurred prior to his becoming District Attorney merely because he is presently the District Attorney of Berks County.

The post-trial motions have been argued and the brief prepared by Charles Haddad, Esquire. Mr. Haddad was an Assistant District Attorney at the time of trial but has not been reappointed since the election of Mr. Morrissey. Mr. Haddad has been assigned as Special Prosecutor to represent the Commonwealth in the post-trial matters and is not an employee of the District Attorney.

There comes a time in all criminal proceedings where one must fish or cut bait. It is not enough to insert a simple blunderbuss paragraph in a brief challenging the effective assistance of counsel at trial and then state that this is done merely to preserve later rights of appeal.

We have reviewed the record carefully and there is no basis to arrest the judgment or to award Biancone a new trial.

Judgment

SUPERIOR COURT OF PENNSYLVANIA
Eastern District

COMMONWEALTH OF PENNSYLVANIA,

v.

JOSEPH FRED BIANCONE,

Appellant.

No. 1135, October Term, 1977.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of BERKS County be, and the same is hereby AFFIRMED.

BY THE COURT:

CHARLES A. HOENSTINE,
Prothonotary.

Dated: April 13, 1978.

Order Filed April 13, 1978

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 1641/1977

COMMONWEALTH OF PENNSYLVANIA,

vs.

JOSEPH FRED BIANCONE,

Appellant.

No. 1135, October Term, 1977

Appeal from the Judgment of Sentence of the Court of Common Pleas, Criminal Division, of Berks County, at Nos. 521, 521 A of 1975.

PER CURIAM: FILED APR 13 1978

Judgment of sentence affirmed.